ATTORNEY FOR APPELLANTS:

STEPHEN W. VOELKER
Voelker Law Office
Jeffersonville, Indiana

ATTORNEYS FOR APPELLEES:

RICHARD T. MULLINEAUX
ERIC D. JOHNSON
VALERIE D. KESSLER
CRYSTAL G. ROWE
Kightlinger & Gray, LLP
New Albany, Indiana

IN THE COURT OF APPEALS OF INDIANA

JAMES BYRD and REBECCA BYRD,	)	
	)	
Appellants-Plaintiffs,	)	
	)	
vs.	)	No. 22A01-0608-CV-341
	)	
TERESA PLAISS, as THE COUNTY AUDITOR, DARLENE McCOY, as FLOYD COUNTY TREASURER and FLOYD COUNTY, INDIANA,	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE FLOYD CIRCUIT COURT
The Honorable Daniel P. Donahue, Special Judge
Cause No. 22C01-0503-CT-176

February 22, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Appellants-plaintiffs James and Rebecca Byrd appeal from the trial court's grant of summary judgment in favor of Teresa Plaiss in her capacity as the Floyd County Auditor, Darlene McCoy in her capacity as the Floyd County Treasurer, and Floyd County (collectively, the County) in the Byrds' negligence action, which stems from the County's sale of certain real property in Floyd County (the Property). Specifically, the Byrds argue that the trial court improperly granted summary judgment in favor of the County because a genuine issue of material fact existed as to whether the Byrds' negligence action is a suit for misrepresentation or a failure of the County to fulfill a duty. The County contends that summary judgment was proper, but it cross-appeals that the trial court erred by finding that the Byrds' loss occurred on March 2, 2004. Finding that the Byrds' loss occurred on April 28, 2003, we conclude that their tort claim notice was untimely pursuant to Indiana Code section 34-13-3-8,[1] and we affirm the judgment of the trial court.

FACTS

The Byrds owned the aforementioned Property. After purchasing the Property, they became delinquent on their property taxes by $4,232.58. On August 13, 2002, the Byrds received notice that the Property was about to be sold because of the delinquent property taxes. That same day, Rebecca tendered $2,153.79 to the County "to keep [the Property] out of the sale." Appellants' App. p. 49. After this payment, the delinquent balance on the Property was $2,078.79.

[1] Indiana Code section 34-13-3-8(a) provides that "a claim against a political subdivision is barred unless notice is filed . . . within one hundred eighty (180) days after the loss occurs."

On September 10, 2002, the Property was included on the 2002 Property Tax Sale List (the Tax Sale List), showing a tax delinquency of $2,078.79. On September 13, 2002, County Auditor Barbara Sillings applied for judgment and order of sale on the Property, which the trial court granted the same day.

On October 2, 2002, the Property was purchased at a tax sale by Hammond Properties LLC Wachovia Bank, N.A. Custodian (Hammond Properties). On April 28, 2003, the County notified the Byrds that the Property had been sold and that the period of redemption would expire on October 2, 2003. The Byrds did not pay the amount required to redeem the Property. On October 8, 2003, the Byrds were notified that Hammond Properties planned to file a petition for the issuance of a tax deed for the Property.

On October 10, 2003, Hammond Properties filed a verified petition for an order directing the County to issue a tax deed (the Former Action). On November 18, 2003, the Byrds filed an objection to Hammond Properties' request for a tax deed. On January 2, 2004, Hammond Properties filed a motion to strike the Byrds' objection because it was not filed within thirty days of Hammond Properties' petition as required by Indiana Code section 6-1.1-25-4.6(a). On March 2, 2004, the trial court granted Hammond Properties' motion, thereby striking the Byrds' objection because it was "time-barred." Id. at 82. That same day, the trial court directed the County to issue a tax deed to Hammond Properties for the Property.

The Byrds filed a "Notice of Tort Claim" (the Tort Claim Notice) on March 29, 2004.[2] Id. at 88. On March 29, 2005, the Byrds filed a negligence claim against the County, alleging that the County was negligent for not removing the Property from the Tax Sale List after the Byrds paid $2,153.79. On November 21, 2005, the County moved for summary judgment, alleging that the Byrds' claim was barred because (1) the Byrds' action was untimely under the Indiana Tort Claims Act (ITCA),[3] (2) the County was entitled to governmental immunity because the Byrds' claim was based on the unintentional misrepresentations of government employees, and (3) the Byrds' claim was previously litigated in the Former Action and, therefore, barred by the doctrine of collateral estoppel.

After a summary judgment hearing on March 29, 2006, the trial court issued an order on April 7, 2006, denying the County's motion for summary judgment but purporting to be in favor of the County.[4] In a nunc pro tunc entry on June 21, 2006, the trial court granted the County's motion for summary judgment and corrected the April 7, 2006, order. Specifically, the trial court ruled, "[the County's] motion for summary judgment is granted on all grounds raised except for the statute of limitations. The court

---

[2] Both parties state in the designated evidence that the Byrds filed the Tort Claim Notice on March 28, 2004, and the attached copy of the Tort Claim Notice is not date stamped. Appellants' App. p. 6, 21, 119. However, March 28, 2004, was a Sunday. Therefore, we will assume that the Byrds' Tort Claim Notice was actually filed on Monday, March 29, 2004, because state and county agencies do not receive filings on Sundays.

[3] Ind. Code § 34-13-3-1 to -25.

[4] The trial court's one paragraph order provides, "The defendant's motion for summary judgment is denied. . . . The defendants prevail on other grounds." Appellants' App. p. 134.

specifically finds that the date of loss to [the Byrds] was March 2, 2004." Id. at 135. The Byrds now appeal.

DISCUSSION AND DECISION

I. Standard of Review

Summary judgment is appropriate only where the evidence shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); Am. Home Assurance Co. v. Allen, 814 N.E.2d 662, 666 (Ind. Ct. App. 2004). A party seeking summary judgment bears the burden of making a prima facie showing that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law. Tack's Steel Corp. v. ARC Constr. Co., Inc., 821 N.E.2d 883, 888 (Ind. Ct. App. 2005). A factual issue is "genuine" if it is not capable of being conclusively foreclosed by reference to undisputed facts. Am. Mgmt., Inc. v. MIF Realty, L.P., 666 N.E.2d 424, 428 (Ind. Ct. App. 1996). Although there may be genuine disputes over certain facts, a fact is "material" when its existence facilitates the resolution of an issue in the case. Id.

When we review a trial court's entry of summary judgment, we are bound by the same standard that binds the trial court. Id. We may not look beyond the evidence that the parties specifically designated for the motion for summary judgment in the trial court. Best Homes, Inc. v. Rainwater, 714 N.E.2d 702, 705 (Ind. Ct. App. 1999). We must accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmovant, and resolve all doubts against the moving party. Shambaugh & Son, Inc. v. Carlisle, 763 N.E.2d 459, 461 (Ind. 2002). On appeal, the trial court's order

granting or denying a motion for summary judgment is cloaked with a presumption of validity. Sizemore v. Erie Ins. Exch., 789 N.E.2d 1037, 1038 (Ind. Ct. App. 2003). A party appealing from an order granting summary judgment has the burden of persuading us that the decision was erroneous. Id. at 1038-39. A grant of summary judgment may be affirmed upon any theory supported by the designated evidence. Bernstein v. Glavin, 725 N.E.2d 455, 458 (Ind. Ct. App. 2000).

II. Tort Claim Act

Indiana Code section 34-13-3-8 provides that "a claim against a political subdivision is barred unless notice is filed . . . within one hundred eighty (180) days after the loss occurs."[5] I.C. 34-13-3-8(a). The purpose of the notice statute is to inform a political subdivision with reasonable certainty of the accident and surrounding circumstances so that the political subdivision may investigate, determine liability, and prepare a defense to the claim. Daugherty v. Dearborn County, 827 N.E.2d 34, 36 (Ind. Ct. App. 2005), trans. denied. The requirement that the notice be given within the 180-day period is strictly construed. Id. A plaintiff's claim is barred as a matter of law by his failure to give a political subdivision notice within 180 days of the loss leading to his claim. Id. at 37.

III. Date of Loss

The parties disagree on the Byrds' date of loss for purposes of the notice statute and, therefore, disagree as to whether the Byrds' Tort Claim Notice was timely.

[5] The Byrds do not dispute that the County is a political subdivision to which this statute applies.

Regarding section 34-13-3-8, the "date of loss is not always definite or easily determined." Garnelis v. Indiana State Dep't of Health, 806 N.E.2d 365, 371 (Ind. Ct. App. 2004) (citing City of Lake Station v. State ex rel. Moore Real Estate, Inc., 558 N.E.2d 824, 827 (Ind. 1990)). "[T]he cause of action of a tort claim accrues and the statute of limitations begins to run when the plaintiff knew or, in the ordinary exercise of ordinary diligence, could have discovered that an injury had been sustained as a result of the tortious act of another." Wehling v. Citizens Nat'l Bank, 586 N.E.2d 840, 843 (Ind. 1992). The question of when a cause of action accrues is generally one of law for the courts to determine. Meisenhelder v. Zipp Exp., Inc., 788 N.E.2d 924, 927 (Ind. Ct. App. 2003).

The Byrds argue that their date of loss was March 2, 2004—the date that the trial court granted Hammond Properties' request for a tax deed in the Former Action—because that is the date that they officially lost the Property. Consequently, the Byrds contend that their Tort Claim Notice—filed on March 29, 2004—was timely. As support for their position, the Byrds cite to the trial court's finding that the "date of loss to the [Byrds] was March 2, 2004." Appellants' App. p. 135. They also direct us to a trial court comment in the Former Action, "But let's look at it this way. If I grant [Hammond Properties'] request for the deed, I don't know that [the Byrds] aren't without a remedy. They can go after [the County] for including [the Property] in the tax sale." Id. at 108. The Byrds argue that this comment demonstrates the trial court's belief in the Former Action that the Byrds' date of loss was not until Hammond Properties' petition for the tax deed was actually granted.

On the other hand, the County argues that the Byrds' date of loss was October 2, 2002—the date that the Property was sold at the tax sale. The County argues that, based on this date, the Byrds' Tort Claim Notice was untimely. Specifically, the County argues that on October 2, 2002, the Byrds "had notice that they had suffered the loss of [the Property], and thus, they were on notice of their claimed loss." Appellee's Br. p. 13. In the alternative, the County argues that, at the very latest, the Byrds' date of loss was October 10, 2003—the date that Hammond Properties filed its petition for the tax deed on the Property. Based on either of these dates, the County argues that the Byrds' Tort Claim Notice was untimely and, therefore, the notice statute bars their action.

As noted above, the trial court expressly found that the Byrds' date of loss was March 2, 2004. Appellants' App. p. 135. However, "[s]pecific findings and conclusions are not required in the summary judgment context, and although they offer valuable insight into the trial court's rationale for its judgment and facilitate our review, they are not binding on this court." Bernstein, 725 N.E.2d at 458. Instead, we can affirm a grant of summary judgment on any theory that is supported by the designated evidence. Id.

Here, the focus of the Byrds' negligence claim against the County is that the Property "was not removed from the tax sale list and was sold at [the] tax sale. . . . Either the Treasurer or the Auditor of Floyd County was negligent [and] it was as a direct result of the negligence that [the Property] was sold." Appellants' App. p. 4 (citing the Byrds' complaint). The Byrds' complaint focuses solely on the alleged negligence of the County in leaving the Property on the Tax Sale List, resulting in the October 2002 sale. Therefore, the 180-day time period began to run when the Byrds knew or could have

discovered through the exercise of ordinary diligence that the Property had been kept on the Tax Sale List and sold. Wehling, 586 N.E.2d at 843.

The designated evidence shows that the County sent the Byrds official notice pursuant to Indiana Code section 6-1.1-25-4.5 on April 28, 2003, informing them that the Property had been sold in the October 2, 2002, tax sale. Appellants' App. p. 67. Therefore, even in a light most favorable to the Byrds, the 180-day time limit began to run on the date of that notice—April 28, 2003.[6]

While the Byrds' do not deny that they received the April 28, 2003, notice, they argue that the date of loss should be March 2, 2004, because that is the date that Hammond Properties received title to the Property. However, we rejected a similar argument in Irwin Mortgage Corp. v. Marion County Treasurer, 816 N.E.2d 439 (Ind. Ct. App. 2004). In Irwin Mortgage, we held that the 180-day time limit began to run when the plaintiff "learned the penalty would be assessed" not on the date that the plaintiff actually paid the penalty. Id. at 447 n.8 (emphasis added). Phrased another way, Irwin Mortgage Company's date of loss for purposes of the notice statute was the date that it learned that it would be assessed the penalty, not the date that it actually paid the penalty and "lost" the money. Here, the Byrds learned that the Property had been sold on April

[6] We decline to find that the 180-day time period began to run on the exact date that the property was sold—October 2, 2002—because, according to the Byrds' complaint, they believed that their $2,078.79 payment to the County on August 13, 2002, would keep the Property from being sold in the 2002 tax sale. Therefore, whether the Byrds actually knew that the Property was sold on October 2, 2002, would be a question of material fact. However, the Byrds do not deny that they received the notice that the County sent them on April 28, 2003, which informed them that the Property had been sold in the October 2002 tax sale. Appellants' App. p. 67. Thus, the 180-day time limit began to run on April 28, 2003.

28, 2003; therefore, the date that they actually lost title to the Property is irrelevant for purposes of this action.

Pursuant to the rationale in Irwin Mortgage, the 180-day time limit began to run on April 28, 2003, and expired on October 27, 2003. Consequently, the Byrds' Tort Claim Notice, filed on March 29, 2004, was untimely and their negligence action against the County is "barred." I.C. § 34-13-3-8(a). Therefore, the trial court properly granted summary judgment in favor of the County.[7] Daugherty, 827 N.E.2d at 37.

The judgment of the trial court is affirmed.

DARDEN, J., and ROBB, J., concur.

[7] Because we determine that the Byrds' action is barred as a matter of law under section 34-13-3-8, it is not necessary for us to reach the Byrds' argument that "it is an issue of fact as to whether [the Byrds' action] is a suit for misrepresentation o[r] a failure [of the County] to do a duty." Appellants' Br. p. 4.